

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

FEDERAL EXPRESS GROUND
PACKAGE SYSTEM, INC.

Employer¹

and

Case No. 29-RC-9626

LOCAL 804, DELIVERY AND WAREHOUSE
EMPLOYEES A/W INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner²

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Scott Kardel, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record³ in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

¹ The Employer's name appears as corrected at the hearing (Tr. 114).

² The Petitioner's name appears as amended in a written stipulation, which the parties signed after the hearing closed, and which is attached hereto as Appendix A.

³ The undersigned Regional Director hereby amends the transcript sua sponte as indicated in the Appendix attached hereto. References to the record are herein abbreviated as follows: "Tr. #" refers to transcript page numbers, and "Er. Ex. #" refers to Employer exhibit numbers.

2. The record indicates that Federal Express Ground Package System, Inc., herein called the Employer or FedEx Ground, is a Delaware corporation with an office and place of business located at 55-90 47th Street, Maspeth, New York, where it is engaged in the transportation of small packages. It appears from the record that the Employer's operation is primarily non-retail in character, inasmuch as most customers are commercial entities, rather than individual consumers. The parties stipulated, *inter alia*, that the Employer purchases and receives goods and materials valued in excess of \$50,000 directly from points located outside the State of New York.

Another jurisdictional issue concerns whether the Employer is an employer within the meaning of Section 2(2) of the National Labor Relations Act (NLRA), or whether it is excluded as a common carrier by air, subject instead to the Railway Labor Act (RLA). Although the Employer declined to stipulate to any jurisdictional conclusion, the parties stipulated the following relevant facts regarding the Employer's corporate structure and operations:

The Employer herein (FedEx Ground) is a wholly-owned subsidiary of FDX, Inc., which is also the parent company of another subsidiary, Federal Express Corporation (herein called FedEx Corp.). Fed Ex Corp. is a common carrier by air, subject to the jurisdiction of the National Mediation Board (NMB) under the RLA.

FedEx Ground, which operates a nationwide pickup and delivery system for small packages, is the successor to RPS, Inc., which in turn was a successor to Roadway Package System, Inc. Roadway Package System was subject to the jurisdiction of the NLRB.

FedEx Ground transports packages almost exclusively by ground transportation. Specifically, less than one percent of the packages handled by FedEx Ground travel by air. FedEx Ground does not perform services principally for the air carrier FedEx Corp. FedEx Ground's operations are neither an integral part of FedEx Corp.'s transportation system, nor are they essential to FedEx Corp.'s services.

The NLRB generally refers questions regarding possible jurisdiction under the Railway Labor Act to the NMB whenever the issue is "doubtful." Federal Express Corp., 317 NLRB 1155 (1995). However, the NLRB has found such referral unnecessary in certain situations, including cases where the employees are "in no way" engaged in activity involving airline transportation functions, or where the NLRB has previously exercised uncontested jurisdiction over the employer in question. United Parcel Service, Inc., 318 NLRB 778 (1995), *enfd* 92 F.3d 1221 (D.C. Cir. 1996)("UPS").

In the UPS case cited above, the NLRB noted that a parent company (United Parcel Service of America, Inc.) had several subsidiaries, including United Parcel Service Co. (UPS Co.), a common carrier by air, and United Parcel Service, Inc. (UPS Inc.), a separate company involved primarily in the ground transportation of packages. The record in that case indicated specifically that more than 92% of UPS Inc.'s packages traveled by ground. Furthermore, the NLRB's jurisdiction over the ground transport operations had been undisputed for many years. Finally, the NLRB noted the following "trucking service" exception to the NMB's jurisdiction: that even where a subsidiary ground-transport company is directly or indirectly owned by an air carrier, the ground-transport company is not subject to NMB jurisdiction if it does not perform services principally for the air carrier, and is not an integral part of the air carrier's transportation

system. Under those circumstances, the NLRB declined to refer the jurisdictional issue to the NMB, and asserted jurisdiction over UPS Inc. *Cf. Federal Express Corp.*, 323 NLRB 871 (1997)(ground-service employees who were employed directly by an air carrier, not a separate subsidiary, and whose trucking functions were critical to the air-express delivery service, subject to NMB jurisdiction).

The UPS case, supra, is analogous to the instant case. Specifically, the stipulated facts indicate that FedEx Ground is a separate subsidiary involved primarily in the ground transportation of packages. Less than one percent of FedEx Ground's packages travel by air. Furthermore, the NLRB's jurisdiction over FedEx Ground's predecessor, Roadway Package System, was apparently undisputed. The facts also indicate that FedEx Ground does not perform services principally for the air carrier, FedEx Corp. Finally, FedEx Ground's operations are neither an integral part of FedEx Corp.'s transportation system, nor are they essential to FedEx Corp.'s services. Accordingly, I find that FedEx Ground is clearly an employer subject to the NLRA, and that it is unnecessary to refer this jurisdictional question to the NMB.

Based on the stipulation of the parties, and on the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein claims to represent certain employees of the Employer.⁴

⁴ The parties stipulated to the Petitioner's status as a labor organization within the meaning of Section 2(5) of the Act. (See Appendix A attached hereto.)

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Local 804, International Brotherhood of Teamsters, AFL-CIO, herein called the Petitioner, seeks to represent a unit of all full-time and regular part-time package handlers, including loaders, unloaders, splitters and sorters, employed by the Employer at its Maspeth, New York facility, but excluding all independent contractors, drivers, drivers' helpers, professional employees, guards and supervisors as defined in the Act.⁵

The Employer contends that the petitioned-for bargaining unit is inappropriate, in that it excludes certain employees whom the Employer characterizes as “plant clerical” employees. Specifically, the Employer contends that the only appropriate unit must also include quality assurance clerks (QA clerks), “swakers” (acronym for employees who *scan, weigh and key in* information from packages), data-entry clerks, check-in clerks and terminal secretaries.

In support of its position on the unit issue, the Employer called its senior manager for the Maspeth facility, Michael Shenhan, to testify. The Petitioner did not call any witnesses to testify. Thus, all of the information below is based on Shenhan's undisputed testimony.⁶

⁵ The petitioned-for unit appears as amended at the hearing.

⁶ It should be noted that the Employer's attorney frequently asked leading questions, as well as questions that asked for conclusions without supplying the underlying facts. For example, the witness was frequently asked whether the hours of various classifications “overlapped” without specifying the exact hours, and whether one classification's wage rate was “comparable” to another's without specifying both rates. (The Petitioner, who was not represented by counsel, made only limited objections to these questions.) Thus, to some extent, Shenhan's “testimony” consisted only of affirmative answers to the

Although the Petitioner contends that the petitioned-for unit is appropriate, it expressed a willingness to proceed to an election in any unit found appropriate herein.

Facts

As noted above, the Employer operates a terminal in Maspeth, New York, as part of its nationwide network of terminals and hubs for transporting packages by ground transportation. The Maspeth facility consists mostly of a large, single-story area containing several dock areas for loading and unloading trucks and vans, long conveyor belts to move packages to and from the dock areas, a sortation area and various staging areas. The facility also has a relatively small, two-story office area. (See Er. Ex. 1, diagram of facility.)

Michael Shenhan, senior manager for the Maspeth facility, described the supervisory hierarchy as follows. Directly under Shenhan are two mid-level managers: the sort manager and the pick-up and delivery (“P & D”) manager. Under those managers, there are immediate supervisors known as service managers, who are in charge of three different phases of the Employer’s operations. First, the “p.m.” or “outbound” service managers supervise an evening shift (from 5:00 p.m. to approximately 11:00 p.m. or midnight) which primarily unloads incoming packages⁷ from trucks and vans, records certain information from the packages, and handles related paperwork (described in more detail below). Incoming packages arrive on trailers from the Employer’s hubs in Woodbridge, New Jersey, Albany, New York and Hartford, Connecticut. Packages also arrive in smaller pick-up and delivery (“P & D”) vans from Brooklyn, Queens and the

attorney’s questions or conclusions. Wherever possible, the undersigned will try to rely on specific, underlying facts, and will note below where those facts are not available on the record.

Bronx, New York. The extent to which the sortation process may begin during the p.m. shift is not clear from the record. Second, the “pre-load” service managers supervise an early-morning shift (2:30 a.m. to 7:30 a.m.) which performs or completes the sortation process and loads outgoing packages onto P & D vans. Both the p.m. service managers and the pre-load service managers report to the sort manager. Third, the “P & D” service managers supervise a day-time shift, wherein drivers take the loaded P & D vans to deliver and pick-up packages from customers. When the drivers return at the end of their day, the p.m. shift starts the cycle again by unloading packages which the P & D drivers have picked up.

The employees involved herein work under the p.m. service managers and the pre-load service managers who, in turn, report to the sort manager. The P & D drivers who report to the P & D service managers are not involved in this case.⁸

There is also an administrative service manager, Ada Palasia, who supervises clerical employees and who apparently reports to Shenhan. Her schedule is not specified in the record.

Package handlers

Petitioner seeks to represent a unit of approximately 67 package handlers. Their duties include unloading inbound packages from trailers and vans, placing packages on the conveyor belts, sorting the packages and then loading them onto outgoing trailers and vans according to their destination. It appears that package handlers do not handle much package-related paperwork. However, Shenhan testified that when they see a package

⁷ It is not clear from the record why this phase is called “outbound,” since it appears to deal primarily with incoming packages.

with a hazardous material sticker, they must remove the top portion of the sticker and place it in a hazardous-material envelope in the driver's van.

Package handlers work both during the night-time shift under the outbound service managers, and during the early-morning shift under the pre-load service managers. The record does not indicate their exact schedule. Package handlers work primarily in the large terminal area at the docks, conveyor belts and sortation area. As explained in more detail below, they also spend some time in the office nearby. Newly-hired package handlers are subject to a "strength test," to make sure they can lift 50-pound packages from the floor to their chest.

All package handlers work part-time. The record does not indicate their rates of pay. As part-time employees, they do not receive paid holidays, paid vacation time or paid sick days.

Swakers

The Employer employs three or four swakers. As noted above, their title is an acronym for scanning, weighing and keying in certain information from packages. They work part-time during the evening shift, from 5:00 p.m. to approximately 10:00 or 11:00 p.m., under the supervision of the outbound service managers.

Specifically, the "swaking" process involves the following duties. Swakers stand next to the conveyor belts and, as package handlers unload packages onto the belts, swakers (1) use a "scan gun" to scan each package's bar code (identifying the customer) into the Employer's system, (2) use an in-motion scale attached to the conveyor belt to

⁸ The Petitioner does not seek to represent the drivers, whom the Employer refers to as "independent contractors" or simply "contractors." This Decision includes no finding as to the drivers' status as employees or independent contractors, and will refer to them as "drivers."

weigh each package and (3) use a keypad station (attached to the scan gun) to manually enter each package's destination zip code. Swakers' duties also include the special handling of certain kinds of packages. For example, when an international package comes onto the conveyor, the swaker must take it to a staging area, remove certain international documentation from the package, and bring the documentation to the data-entry clerks. After the data-entry clerks enter the information, the swaker labels the package and puts it back on the conveyor belt. Furthermore, whenever a swaker notices a package without an address label, he or she brings it to a staging area. At the end of the shift, the swaker places a "return to sender" label on the package, and leaves it for package handlers on the early-morning shift to make sure it gets appropriately loaded for return to the sender. Swakers also generally assist with the "wrap up" or "clean up" process at the shift's end, i.e., dealing with various problematic packages that have been held aside.

As the description of their duties indicates, swakers spend most of their time working at the conveyor belts near the dock areas. (Their locations are indicated by the number 4 on Er. Ex. 1.) Shenhan testified that they spend only a small percentage of their time in the office. Swakers must pass the same strength test as package handlers, since their duties entail some lifting of packages. Shenhan stated that swakers are not required to have a higher level of education than the package handlers.

Shenhan also testified regarding swakers' interaction and interchange with the package handlers. He stated that swakers communicate with package handlers if they think the conveyor belt is moving too fast or too slowly, although Shenhan admitted on cross examination that the belt is automatically set at a standard speed, and that the

service managers are ultimately responsible for setting the speed. Swakers and package handlers work together in handling certain packages that cannot be placed on the conveyor belt, e.g., because of their awkward size or shape or liquid content.

Specifically, they must carry the package to the swak area, and place it on a still scale (not the in-motion scale) for weighing. Finally, Shenhan also testified that, when there is a slow “flow” of work for a particular swaker, the swaker may ask a handler to give him a bin of small packages, so that he can get started on those before the flow of larger packages resumes. In response to a leading question as to whether this interaction happens “on a daily basis,” Shenhan responded affirmatively.

Shenhan stated that swakers are sometimes temporarily assigned to help load and unload packages, such as during package handlers’ absences, although he did not state how often this substitution occurs. As for permanent transfers, Shenhan testified that two of the four current swakers (identified as Carl and Ed) started as package handlers. Shenhan stated that swakers have also transferred into package handler positions, although not recently.

As noted above, swakers work part-time, from 5:00 p.m. to 10:00 or 11:00 p.m.. In response to a leading question as to whether their hours are “almost identical” to the package handlers’ hours, Shenhan answered affirmatively, although the package handlers’ hours were not specified on the record. As part-time employees, the swakers do not receive paid holidays, vacation or sick days. Their wage rate ranges from \$8.50 to \$10.00 per hour. In response to a question as to whether swakers’ pay rate is “comparable” to the package handlers’ rate, Shenhan answered affirmatively, although the package handlers’ wages were not specified on the record.

Quality assurance clerks

The Employer employs six quality assurance (“QA”) clerks at the Maspeth facility, all at different times. Some work full-time, some part-time. It is difficult to determine the QA clerks’ exact hours and supervision from the record. Shenhan initially testified that QA clerks start working at the following times: one at 2:00 a.m., one at 2:30 a.m., two at 4:00 a.m., and two at 5:00 a.m. He initially characterized these shifts as occurring mostly during the early-morning “pre-load” shift, explaining that QA clerks need to help get out as many packages as possible before the drivers arrive (after 7:30 a.m.) to take away the loaded vehicles. However, Shenhan then revised the QA clerks’ starting times as follows: one clerk each starting at 2:30 a.m., 4:00 a.m., 5:00 a.m., 2:00 **p.m.**, 4:00 **p.m.** and 5:00 **p.m.** Obviously, these hours only partially overlap with the pre-load shift (2:30 a.m. to 7:30 a.m.). As for supervisors, Shenhan testified that QA clerks are supervised by the service managers for “the particular shift, at that time.” That would seem to include service managers on all three shifts since, for example, a QA clerk starting at 2:00 p.m. would work at least a few hours during the P & D service managers’ shift before the outbound service managers start at 5:00 p.m. Nevertheless, in response to a question as to whether QA clerks have the “same” service manager/supervisor as the package handlers, Shenhan responded affirmatively, even though package handlers do not work during the day-time shift and are not supervised by the P & D service managers at that time. In any event, Shenhan also testified that QA clerks are supervised in part by the administrative service manager, Ada Palasia.

QA clerks' primary duty is to handle defective packages. Specifically, they re-tape slightly damaged packages, and re-pack extensively damaged packages into new cartons. They also correct addresses for packages with an incorrect address. QA clerks find the correct addresses by a variety of means, such as calling the shipper/customer, and looking in telephone books and other directories. At the end of their shift, QA clerks bring address-correction forms to the data-entry clerks in the office, so that the information can be entered into the Employer's computer system. Shenhan testified that the QA clerks also "use a computer" in the office, although he did not specify exactly what they do on the computer. At some point, the QA clerks put the corrected packages back into circulation, for delivery later that day or the next day.

Generally, address problems are brought to the QA clerks' attention by drivers, based on the drivers' knowledge of their route or on their unsuccessful attempt to deliver a package. The QA clerk who begins work at 5:00 p.m. also goes through the vans at the end of the drivers' day, to scan and correct the addresses of any packages which the driver could not deliver due to address problems that day. Package handlers and swakers also bring address problems and physically damaged packages to the attention of QA clerks.

QA clerks work in various areas of the terminal, spending an estimated 85 to 90% of their time in the docks and sortation areas. They spend some time in a locked holding area for packages which may need to be kept overnight or longer (indicated by the number 5 in the top, left-hand corner of Er. Ex. 5), and an open area where certain packages (misloads, no addresses, etc.) are accumulated for the pre-load sortation (indicated by the number 5 on the right-hand side of Er. Ex. 1). Shenhan testified that

QA clerks spend approximately 10 to 15% of their time in the office using a computer.

QA clerks must pass the same strength test as package handlers, since their duties include some lifting of packages. They generally have the same level of education as package handlers (not specified on the record).

Approximately twice per month, when the Employer is short-handed, QA clerks help the package handlers load and unload packages. Shenhan also testified that QA clerks and package handlers temporarily fill in for each other, although he did not indicate how often this occurs. As for permanent transfers, Shenhan testified that three of the current QA clerks used to work as package handlers.

As mentioned above, some QA clerks work full-time and others work part-time. Only the full-time QA clerks receive paid holidays, vacation time and sick days. Their wage rates range from \$8.50 to \$10.00 per hour. In response to a question as to whether this range was “comparable” to the package handlers’ wages, Shenhan answered affirmatively, but the package handlers’ wages were not specified on the record.

Check-in clerk

The Employer employs one check-in clerk, Evelyn (last name not specified). She works part time, 5:00 p.m. to 10:00 p.m. She is supervised both by the outbound service manager and by the administrative service manager.

The check-in clerk’s title apparently refers to her work “checking in” drivers at the end of their shift. Specifically, she collects and verifies various forms of paperwork and electronically-scanned information from the drivers’ delivery and pickup of packages that day. For example, at the end of the drivers’ shift, the check-in clerk gives each driver a P & D settlement record form (Er. Ex. 2), which the driver fills out to account for

the total number of stops made and packages picked up and delivered. The check-in clerk verifies the accuracy of the numbers, and forwards the form to data-entry clerks. The check-in clerk also collects the following other forms from drivers: a summary delivery record (Er. Ex. 3), a daily pick-up listing (Er. Exhibits 4 and 5), hazardous material certifications (Er. Ex. 6), pick-up records from each individual customer (Er. Ex. 7), a C.O.D. control list (Er. Ex. 8) and a cash log (Er. Ex. 9). The check-in clerk forwards these forms to the data-entry clerks for entry into the Employer's records. The check-in clerk also collects the cash which the drivers collected for C.O.D. deliveries that day. In addition, when the check-in clerk finds a reference in the paperwork to any "control" packages picked up (i.e., those worth more than \$5,000), she must retrieve the package from the driver's van, label it, and bring it to the office for special data entry, before bringing it back out to the swak area for further processing. She also scans any "return" packages that the drivers could not deliver that day for whatever reason, and generally helps resolve any discrepancies in the drivers' paperwork.

Shenhan testified that the check-in clerk works primarily in the terminal office (location indicated by the number 1 on Er. Ex. 1), but that she also spends 10 to 15% of her time in the main terminal area, including about 20 to 30 minutes per day actually handling packages. Check-in clerks must pass the same strength test as package handlers. They do not generally have a higher level of education than package handlers.

Shenhan also testified that package handlers substitute for the check-in clerk during her vacations or other absences, but he did not state how often this substitution occurs. As for permanent transfers between those classifications, he stated that former

check-in clerks Valerie Fitz and Wendy Santorro had previously worked as package handlers.

As described above, the check-in clerk's duties include collecting information and cash from drivers, as well as handling "control" packages, scanning the return packages and resolving discrepancies in the drivers' paperwork. Obviously, these duties entail a great deal of contact with drivers. Shenhan also gave examples of the check-in clerk's contact with package handlers. For example, they may ask package handlers for assistance in locating or moving the control packages. She also has contact with the package handlers near the vans, if they are unloading packages there when she comes to scan the return packages or to check on discrepancies in the drivers' paperwork. To some extent, she also assists with some quality-assurance and customer-assistance duties, such as correcting an address label after a customer has called to report a mistake, or correcting a problem with the "call tags" used for packages that must be returned to the sender. These duties cause the check-in clerk to go to the terminal areas where package handlers are working, and may entail asking for their help in locating particular packages.

Conversely, Shenhan also gave examples of when package handlers go into the office check-in area as part of their duties. Specifically, some package handlers who scan packages with a hand-held scanner⁹ must go to the office to download the information from the scanner to the computer. Either the package handler or the check-in clerk can perform the download function. Package handlers occasionally go to the office for office supplies or C.O.D. forms. Finally, if a customer wants to come pick up a package

⁹ It is not clear from the record whether or how the package handlers' scanning is different from the scanning performed by swakers. Shenhan testified that the hand-held scanners are a new product, which some package handlers use to scan packages upon their being loaded onto the P & D vans. Ultimately, the Employer intends to implement this scanning "100%."

immediately, rather than waiting for it to be delivered by a driver, a package handler may be asked to bring the package to the office. Overall, Shenhan estimated that package handlers spend approximately 20 minutes per day in the office.

Check-in clerks earn between \$9.00 and \$10.50 per hour. When asked whether this range is “comparable” to the package handlers’ range, Shenhan answered affirmatively. As a part-time employee, the check-in clerk is not entitled to paid holidays, vacation or sick days, nor pension or medical benefits.

Data-entry clerks

The Employer employs two data-entry clerks. They both work primarily during the outbound shift. Specifically, one works full-time from 3:00 p.m. to 11:00 p.m., and the other works part-time from 5:00 p.m. to 10:00 p.m. They are both supervised by the outbound service manager and the administrative service manager.

As their job title indicates, these employees enter data into the Employer’s computer system. Specifically, they enter and/or file all the information collected from the drivers by the check-in clerk, regarding all the packages picked up and delivered earlier that day (Er. Exhibits 2 through 9, described above). They also use this information to generate certain reports, such as a C.O.D. control log (Er. Ex. 10), a hazardous material data-entry report (Er. Ex. 11) and an international shipment report (Er. Ex. 12).

Data-entry clerks work primarily in the office. (Their location is indicated by the number 2 on Er. Ex. 1.) Data entry clerks must pass the same strength test as package handlers. Shenhan did not specify whether the data-entry positions require a different level of education or qualifications than package handlers.

Shenhan gave several examples of data-entry clerks' going into the main terminal area, such as temporarily filling in for absent swakers; bringing "EDSI lists" (shipping data which is electronically transmitted by customers and which prints out from a printer in the office) out to the swakers; handling packages for customers who want to pick up or drop off packages in the evening, or bringing in packages that customers have dropped off; getting packing supplies, such as when a customer drops off a poorly-packaged carton; and notifying package handlers of personal phone messages. In response to leading questions regarding data-entry clerks' other duties in the terminal, Shenhan testified that the data-entry clerks fill in for QA clerks, pick up address corrections from the QA clerks and help package handlers load and unload packages during high-volume times. However, Shenhan later conceded that "it's not common" for data-entry clerks to load and unload vehicles. Upon further questioning by the Hearing Officer, Shenhan estimated that data-entry clerks spend about 10% of their time in the main terminal area. He also testified that data-entry clerks have some contact with package handlers when the handlers bring packages into the office (e.g., when hazardous material documentation, international documentation or even address labels are missing from packages) or when they bring certain forms into the office for data entry (e.g., address correction forms and return-to-shipper forms). How often these events occur is unclear from the record.

Data entry clerks earn between \$8.50 and \$10.00 per hour. When asked if this range was "comparable" to the package handlers' range, Shenhan answered yes. The full-time data-entry clerk receives such benefits as paid vacation, holidays and sick days, whereas the part-time data-entry clerk does not.

Terminal secretaries

The Employer employs two terminal secretaries. They are supervised by the administrative service manager and by Shenhan. They both work full-time during day-time shifts, one from 7:00 a.m. to 3:00 p.m., and the other from 8:00 a.m. to 4:00 p.m. When asked whether the secretaries' hours "overlap" with the package handlers' hours, Shenhan answered affirmatively. However, given that package handlers work during the evening and early morning shifts, it appears that any overlap would be minimal (e.g., from 7:00 to 7:30 a.m.).

Shenhan testified that the secretaries' duties include "phone work"; billing; communication with various managers, corporate offices and regional offices; intra-company shipping; replenishing supplies in the dock areas; and dealing with some customer pick-ups and drop-offs at the facility. It appears that they may also have some involvement in the payroll process, since Shenhan testified that package handlers "interface" with the secretaries on "payroll issues."

Unlike the other classifications described above, the terminal secretaries do not have to take the strength test. Shenhan testified that secretaries do not load or unload trucks, and that no secretaries have transferred into package-handler positions, either permanently or temporarily. Conversely, no package handlers have transferred into secretary positions at the Maspeth facility, and Shenhan conceded that package handlers do not necessarily know how to perform the secretaries' duties such as typing and word processing. Furthermore, Shenhan estimated that the terminal secretaries spend only 10 minutes per day physically handling packages.

Terminal secretaries work primarily in the office. (Their location is indicated by the numbers “3” on Er. Ex. 1.) Shenhan testified that they spend less than 5% of their time in the main terminal area. That 5% includes such duties as posting communications on the Employer’s bulletin board, communicating with QA clerks regarding the need for supplies, and some involvement with packages that customers drop off or pick up directly at the facility. Shenhan also gave examples of when package handlers may communicate with terminal secretaries in the office, e.g., regarding the need for supplies, payroll issues, and bringing packages for customer pick-ups or for intra-company dissemination.

Terminal secretaries are paid on an hourly basis, but their exact wage rates do not appear on the record. As full-time employees, they receive such benefits as paid holidays, vacation, sick days, medical and pension benefits.

Other information common to all classifications

The classifications described above have other characteristics in common. As hourly-paid employees, they are all eligible for overtime pay. However, since most are part-time employees, they do not usually work enough hours to make overtime. They are all paid on the same day and in the same manner.

Employees are all eligible for certain benefits, including an employee of the month bonus, a stock purchase plan, a tuition refund program and an education loan program called “Concern.” They all attend the same company parties.

None of the classifications involved herein wear a uniform. They are all allowed to wear the same type of “casual attire.”

All employees have the same use of the facility, including the same rest rooms, meeting room, canteen, parking area, bulletin board and access to an on-site medical

facility. Shenhan initially testified that all employees are subject to the same security procedures when they enter and exit via the security booth, located approximately 50 yards from the front door of the office. However, on cross examination, some differences emerged. For example, it appears that at least some clerical employees are allowed to take their purse in with them into the facility, whereas package handlers are required to leave any valuables (e.g., wristwatches) in an envelope at the security booth, and are not allowed to have any sort of purse or bag with them during the sortation process. Nevertheless, Shenhan added that everyone, including management, is subject to search upon exiting the facility, to protect against theft.

Package handlers and the other classifications described above are subject to the same job-application process, the same orientation procedure for new employees, and receive the same training in handling hazardous materials. They are subject to the same personnel policies, including safety rules, drug-testing policy, disciplinary procedures, transfer procedures, layoff/recall procedures, no solicitation/distribution rule, employee purchase policy (for purchasing T-shirts and other company paraphernalia) and complaint procedure.

Discussion

In determining whether a petitioned-for unit's exclusion of clerical employees is appropriate, the Board makes an important distinction between plant clerical employees and office clerical employees. In the context of production-employee units, for example, plant clerical employees whose duties are directly related to the production process – e.g., transcribing sales orders to facilitate production, maintaining inventories and ordering supplies – are customarily included in the unit because they share a strong community of

interest with production employees. By contrast, office clerical employees, whose duties are more related to general office operations – e.g., billing, payroll, phone and mail – are customarily excluded from production units because they do not share a similar community of interest. *See generally* T.E. Hamilton, sole proprietor, d/b/a Hamilton Halter Co., 270 NLRB 331 (1984); Brown & Root, Inc., 314 NLRB 19 (1994); PECO Energy Co., 322 NLRB 1074 (1997). Although the Board has acknowledged that “the distinction between office clericals and plant clericals is not always clear,” Hamilton Halter, *supra*, the functional integration between the clericals’ duties and the production process is “a highly significant factor.” Interstate Warehousing of Ohio, LLC, 333 NLRB No. 83, slip op. at 7 (2001). Of course, other community of interest factors must also be considered, including any common supervision, the extent of contact and interchange between the groups, common work situs, hours, and similar wages, benefits and working conditions.

For example, in Hamilton Halter, *supra*, two clerical employees’ duties included taking customers’ orders, preparing invoices which were then routed to the production area, and maintaining supplies such as tape and shipping labels. The evidence also indicated that those employees worked in an office immediately adjacent to the production floor. They spent between 5% and 30% of their time in the production area, helping to fill customers’ orders and occasionally helping to load and unload trucks. The Board found them to be plant clerical employees, and included them in the production and maintenance unit.

The Board has also applied the same distinction between plant clericals and office clericals in the context of warehouse-employee bargaining units. For example, in Jacob

Ash Co., 224 NLRB 74 (1976), certain clerical employees worked in an open office area on the first floor of the employer's warehouse. Their duties included receiving orders from customers, and preparing invoices for the warehouse employees to process. These clerical employees had regular contact with warehouse employees, such as when they gave them invoices, resolved questions regarding customers' orders, and picked up certain invoices at the end of the day. At times, the clerical employees actually helped pick the customers' orders. They also shared common supervision with the warehouse employees. In that case, the Board found them to be plant clerical employees and included them in the unit with warehouse employees.

Furthermore, in United Parcel Service, 258 NLRB 223 (1981), the Board distinguished between "operating clericals" and "office clericals." In that case, the petitioning union already represented a unit of UPS drivers, sorters and other classifications directly involved in transporting packages, and now sought to represent a unit of "operating clerks." The operating clerks' duties included checking packages for deficient addresses and deficient wrapping. They worked side by side with unit employees, under the same supervisors. Even though there was no evidence of substitution between operating clericals and the existing unit classifications, the Board found their duties closely related to the package-handling process. By contrast, the Board excluded as "office clericals" other employees who worked in departmental offices, under different supervision, and performed dissimilar functions.

Finally, in Interstate Warehousing of Ohio, supra, the petitioning union sought a unit of warehouse employees whose primary function was to physically move product (frozen food) within the facility, including loaders, off loaders, stockers and pickers.

However, this unit was found to be inappropriate inasmuch as it excluded certain warehouse clerical employees. For example, shipping and receiving clerks were found to have a close community of interest with the petitioned-for warehouse employees, mandating their inclusion in the unit. They handled paperwork and data entry for inbound and outbound product, such as processing paperwork from drivers, generating paperwork regarding the products to be loaded and unloaded, checking for discrepancies, and finally entering information into the employer's computerized system. Although the shipping and receiving clerks worked primarily in an office located on the dock, they had regular contact with warehouse employees, and shared common supervision. One shipping and receiving clerk had permanently transferred to a warehouse employee position. Similarly, inventory clerks -- who worked both in the office and in the warehouse freezers, comparing computerized inventory lists with the actual inventory of frozen products, resolving discrepancies and correcting the computerized records -- were also included in the unit. The record also indicated a number of temporary and permanent transfers between the inventory employees and the petitioned-for warehouse employees. In requiring the inclusion of these warehouse clericals, the degree of functional integration was emphasized as a "highly significant factor." 333 NLRB No. 83, slip op. at 7. Even though the clerical work was recognized as distinct from the physical work of the petitioned-for employees, their function of gathering, recording and distributing information and records was directly related to the physical movement of product throughout the employer's warehouse operation. Of perhaps secondary importance, evidence of interchange, common supervision, and similar benefits, work rules, personnel policies, wage rates and hours was also noted.

Bearing these principles in mind, I find that the swakers, quality assurance clerks, check-in clerk and data-entry clerks must be included in the unit along with the petitioned-for package handlers. By contrast, I find that the terminal secretaries are more akin to office clerical employees, whose inclusion in the unit is not required.

Specifically, I find that the swakers, QA clerks, check-in clerk and data-entry clerks' duties are directly related to the physical movement of packages into, throughout and out of the Employer's terminal facility. The swakers obtain and record information from packages immediately after the package handlers have unloaded them. They also handle certain documents that are directly related to the handling of packages, such as international labels and return-to-sender labels. QA clerks' functions are also directly related to the movement of packages through the system, including the correction of addresses and repacking damaged packages (similar to the "operating clerks" in the UPS case described above). Thus, there is a high degree of functional integration between those employees' work and the package handlers' work. Furthermore, swakers and QA clerks spend most of their time working in the main terminal area, i.e., in the same area where package handlers work, and there is some evidence of contact, temporary substitution and permanent transfers between those groups. Swakers and QA clerks must pass the same strength test as package handlers, which underlines their involvement in the movement of packages. There is also evidence of common supervision, since the swakers and QA clerks are supervised by the outbound service manager and the pre-load manager, although QA clerks are also supervised by the administrative service manager.

I also find that the check-in clerk and data-entry clerks resemble the plant/warehouse clericals described in the cases above. Even though they spend less time

in the main terminal area (10% to 15%) than swakers and QA clerks, their duties are closely related to the movement of packages, which constitutes the core of the Employer's terminal operation. They collect and process various forms regarding the pick up and delivery of packages (including P & D settlement forms, summary delivery records, daily pick-up listings, hazardous material certifications, pick-up records from each individual customer, C.O.D. control lists and cash logs). They also retrieve "control" packages from the terminal, and process information related to them before returning those packages back to the terminal. The check-in clerk also scans return packages and helps resolve discrepancies in the package-related paperwork. The data-entry clerks also bring EDSI lists out to the swakers. These duties, similar to the warehouse clerks' duties in Interstate Warehousing, supra, demonstrate a high level of functional integration with the movement of packages in the main terminal area. The check-in clerk and data-entry clerks must also pass the same strength test as package handlers. There is some evidence of contact between those classifications, both in the main terminal area and in the office. Furthermore, there is also evidence of temporary and permanent transfers between those classifications. Finally, the same outbound service managers supervise the package handlers, check-in clerk and data-entry clerks during the evening shift.

By contrast, the terminal secretaries' duties -- including phone work, billing, inter-office mail, typing and possibly payroll -- are more typical of office clerical employees than plant clericals. Their involvement in the package-moving functions of the Employer's terminal operation is extremely limited. The terminal secretaries' day-time shift appears to have little overlap with the package handlers' evening and early-

morning shifts. Terminal secretaries spend less than 5% of their time in the main terminal area. Whatever contact they have with employees in the main terminal area (related to ordering supplies, and dealing with packages that customers have dropped off and picked up) appears to be extremely limited. Terminal secretaries do not have to take the strength test, and there is no evidence of temporary or permanent transfers between those classifications at the Maspeth facility.¹⁰ Finally, there is no evidence of common supervision. In sum, they are more akin to the office clerical employees than the operating clerks in the UPS case cited above. Thus, I conclude that the terminal secretaries' inclusion in the unit is not mandated.

Finally, it should be noted that I do not rely on the evidence regarding employee benefits and other characteristics. The eligibility for benefits such as paid holidays, vacation and sick days depends more on employees' part-time or full-time status rather than their classifications. Other information regarding use of the facility, security procedures, attending company parties, etc., seems to be generic information applicable to all employees, and is not especially helpful in evaluating clerical employees' status as plant clericals or office clericals. Neither do I find helpful the conclusionary testimony that certain wage rates are "comparable" to others, without the having the underlying facts to compare.

In sum, I have found that the swakers, QA clerks, check-in clerk and data-entry clerks employed at the Employer's Maspeth terminal share a strong community of

¹⁰ Contrary to an assertion in the Employer's brief, the record does not demonstrate that package handlers have temporarily substituted for terminal secretaries. (Page 107 of the transcript indicates that package handlers have filled in for a "clerical position," but not specifically the terminal secretary position.)

interest with the petitioned-for package handlers. As the Board noted in the plant/warehouse

clerical employee cases cited above, I particularly note the close functional integration of their work and the movement of packages to, from and throughout the terminal. I therefore find that their inclusion in the unit with package handlers is required. By contrast, I shall exclude the terminal secretaries as office clerical employees.

Accordingly, I hereby find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a)(1) of the Act:

All full-time and regular part-time package handlers (including loaders, unloaders, splitters and sorters), swakers, quality assurance clerks, check-in clerks, and data-entry clerks employed by the Employer at its 55-90 47th Street, Maspeth, New York facility, but excluding office clerical employees, terminal secretaries, independent contractors, drivers, drivers' helpers, professional employees, guards and supervisors as defined in the Act.

Because the unit found appropriate herein is larger than the petitioned-for unit, the Petitioner will be given 14 days from the date of this Decision to submit additional authorization cards necessary to support the required showing of interest in the larger group.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also

eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by Local 804, Delivery and Warehouse Employees a/w International Brotherhood of Teamsters, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of the election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election.¹¹ North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor

¹¹ This list may initially be used to assist in determining an adequate showing of interest. The list shall be made available to the Petitioner only after I have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

(Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before May 17, 2001. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to the commencement of the election that it has not received the notices. Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board,

addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570.

This request must be received by May17, 2001.

Dated at Brooklyn, New York, May 10, 2001.

/S/ ALVIN BLYER

Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201

177-1683-7500

280-4000 et seq.

440-1760-1900 et seq.

440-1760-2400

APPENDIX B

The record is hereby amended as follows: Inasmuch as Petitioner's Exhibit 1 was rejected by the Hearing Officer (see transcript p. 216), the cover sheet for that exhibit should identify it as a rejected exhibit.

The transcript is hereby amended as follows:

Page 2, line 7: The correct address for the Employer's attorney is "300 North Main Street," rather than "300 Northman".

Page 2, line 19: The Petitioner's office is in Long Island **City**, New York, and the correct zip code is 11101.

Page 10, line 20 et seq.: All references to "swackers" should be spelled "swakers" (acronym for employees who *scan, weigh and key in* information from packages).

Page 16, line 10: "reader of the record" rather than "record of the record".

Page 114, line 23: "Maspeth" rather than "Massbeth".

Page 115, line 7: "integral" rather than "intrical".